

(2)

Marvin Mathis #304144/244859-C  
 New Jersey State Prison  
 P.O. Box 861  
 Trenton, New Jersey 08625-0861  
 Defendant-Movant/ Pro se

Presently Confined

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARVIN MATHIS,

Defendant-Movant.

SUPERIOR COURT OF NEW JERSEY  
 LAW DIVISION - UNION COUNTY  
 Union County Ind. No.  
 97-02-123

CRIMINAL ACTION

Motion For Reconsideration  
 of February 29, 2008 Order  
 Denying Defendant's Motion  
 For Post-Conviction Relief  
 And Allowing Defendant  
 To Proceed As An Indigent

WITH RELIANCE on the attached Letter-brief and certification, the undersigned Marvin Mathis, Defendant-Movant acting Pro se in the above captioned matter, hereby moves for entry of the following relief:

a. An Order granting the Defendant's Pro se Motion for Leave To Proceed As An Indigent;

b. An Order granting the Defendant's Pro se Motion For Reconsideration of Order Denying Defendant's Motion For Post-Conviction Relief.

Dated: March 10, 2008

Respectfully submitted,

Marvin Mathis

Marvin Mathis Pro Se

Marvin Mathis #304144/244859-C  
 New Jersey State Prison  
 P.O. Box 861  
 Trenton, New Jersey 08625-0861  
 Defendant-Movant/ Pro se.

Presently Confined

SUPERIOR COURT OF NEW JERSEY  
 LAW DIVISION - UNION COUNTY  
 Union County Ind. No.  
 97-02-123

STATE OF NEW JERSEY,

Plaintiff-Respondent;

v.

MARVIN MATHIS,

Defendant-Movant.

CRIMINAL ACTION

Motion For Reconsideration  
 of February 29, 2008 Order  
 Denying Defendant's Motion  
 For Post-Conviction Relief

LETTER BRIEF AND APPENDIX ON BEHALF OF  
 DEFENDANT-MOVANT

Dear Honorable Judge John F. Malone:

Please accept this letter brief in lieu of a more formal  
 brief, pursuant to R. 2:6-2(b), in support of defendant's Motion  
 For Reconsideration.

### Procedural History

Marvin Mathis (hereafter) shy of his sixteenth birthday, was charged in Union County Juvenile Complaint No. FJ 20-1786-96 with acts which, if committed by an adult, would constitute armed robbery N.J.S.A. 2C:15-1 and 2C:2-6 and felony murder N.J.S.A. 2C:11-3(a) (3).

Following a wavier hearing held on October 10 and November 11, 1996, the Honorable Judge Rudolph W. Hawkins, J.S.C. decided to waive juvenile-defendant jurisdiction.

On February 04, 1997, a Union County Grand Jury returned Indictment No. 97-02-00123 charging the defendant with first-degree murder N.J.S.A. 2C:11-3a(1) and/or (2), first-degree robbery N.J.S.A. 2C:15-1, first-degree felony murder N.J.S.A. 2C:11-3a(3), second-degree possession of a firearm for an unlawful propose N.J.S.A. 2C:39-4a and third-degree possession of a weapon for an unlawful purpose. N.J.S.A. 2C:39-5b.

Following an unsuccessful Miranda motion before the Honorable Judge John F. Malone, J.S.C., on June 9 and 10, 1998, the defendant was tried before Judge Malone and a jury on June 10, 11, 16, 17, and 18, 1998. Defendant was found guilty of all charges.

On August 14, 1998, the court sentenced the defendant to an aggregate term of 50 yeas in prison, with a parole bar of 30 years. The appropriate statutory penalties were imposed, and the defendant was given credit of 934 days for time spent in custody.

By Order of March 15, 1999, the Appellate Division granted the defendant's motion to file a Notice of Appeal nunc pro tunc.

On appeal to the Superior Court of New Jersey Appellate Division, Defendant's conviction were affirmed on June 02, 2000.

Thereafter defendant sought further review of his case by way of a petition for certification which was filed with the Supreme Court of New Jersey. His petition was denied without opinion on October 10, 2000.

On April 26, 2001, filed a timely Petition for Post-Conviction Relief with the Criminal Case Manager of the Union County Superior Court.

On February 29, 2003, a Post-Conviction Relief hearing was held. And this Court heard oral argument on defendant's letter-brief to determine if a prima facie case was presented to warrant an evidentiary hearing. During that hearing PCR counsel did not argue, in any manner, the issues contained in the defendant's supplemental pro se brief nor his second amended petition.

On February 29, 2003, the Honorable Judge John F. Malone, J.S.C. denied defendant's petition for Post-Conviction Relief without scheduling an evidentiary hearing.

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"Da" refers to the appendix to this letter brief.

LEGAL ARGUMENT

DEFENDANT'S CLAIMS RAISED IN HIS FEBRUARY 24, 2005, SUPPLEMENTAL BRIEF AND HIS SEPTEMBER 14, 2006, SECOND AMENDED PETITION WERE NOT ADDRESSED BY ASSIGNED PCR COUNSEL AS REQUIRED BY R. 3:22-6(d), State v. Rue, 175 N.J. 1 (2002) AND State v. Webster, 187 N.J. 254 (2006), THEREBY REQUIRED A NEW PCR HEARING

In the N.J. Court Rules, Rule 3:22-6(d) requires that assigned PCR counsel bring forth to the Court all claims raised by the defendant. R. 3:22-6(d) provides in pertinent part:

"Counsel [assigned to represent a defendant on a petition for post-conviction relief] should advance any grounds insisted upon by defendant notwithstanding that counsel deems them without merit."

Interpreting this rule, the Court stated in State v. Rue, 175 N.J. 1, 19 (2002):

"[C]ounsel must advance the claims the client desires to forward in a petition and brief and make the best available arguments in support of them. Thereafter, as in any case in which a brief is filed, counsel may choose to stand on it at the hearing, and is not required to further engage in expository argument. In no event however, is counsel empowered to denigrate or dismiss the client's claims, to negatively evaluate them, or to render aid and support to the state's opposition. That kind of conduct contravenes [R. 3:22-6(d)].

In State v. Webster, 187 N.J. 254, 257 (2006), the Court refined Rue, stating:

"Reduced to its essence, Rue provides that PCR counsel must communicate with the client, investigate the claims urged by the client, and determine whether there are additional claims that should be brought forward. Thereafter, counsel should advance all of the legitimate arguments in support of a particular claim raised by defendant, no argument need be made on that point. Stated differently, the brief must advance the arguments that can be made in support of the

petition and include defendant's remaining claims, either by listing them or incorporating them by reference so that the judge may consider them."

In the present case, on February 24, 2005, defendant filed a supplemental pro se brief in support of his Post-Conviction Relief to include the following issues:

- Point I: Defendant's State Constitutional Right to Indictment by Grand Jury was Violated when the Facts Required to be Found Before Defendant could be tried as an Adult were not Charged in the Indictment. Furthermore, Defendant's Federal and State Constitutional Rights to Trial by Jury were Violated when a Judge made the Finding that Resulted in Defendant being tried as an Adult, and not as a Juvenile.
- Point II: Defendant's Federal and State Constitutional Right to a Jury Trial were Violated when the Trial Judge Found the Aggravating Factors used to Increase Defendant's Sentence for Murder Beyond the Prescribed Maximum. Furthermore, Defendant's (State Constitutional Right to Indictment by Grand Jury was Violated when the Aggravating Factors used to Increase the Sentence for Murder were not Charged in a Indictment.
- Point III: Defendant's Waiver of his Miranda Right was not Knowing and Intelligent Because Defendant was not Informed that, Although He was a Juvenile any Statement made by Him could be used Against Him in a Prosecution as an Adult.
- Point IV: Trial counsel was Ineffective for Failing to Present Evidence of Defendant's Low Intellectual Functioning in Order to Establish that Defendant's Waiver of his Miranda Rights was not Knowing and Intelligent.
- Point V: Trial Counsel was Ineffective for not Presenting in Mitigation of Sentence the Evidence of Defendant's Low Intellectual Functioning and Personality Disorder.
- Point VI: The New Rule Proposed in Point III Should be Retroactively to Applied to Defendant.

Point VII: The Claims for Relief are not Barred by a Procedural Rule.

[Da 1 and 3 ].

On September 14, 2006, defendant filed s second amended petition in support of his Post-Conviction Relief, which provides in pertinent part:

4. To substantiate petitioner's Competency claims set forth in his Supplemental Verified Petition for Post-Conviction Relief, which was submitted [Dated February 02, 2006] Petitioner requests that assigned counsel Lewis D. Thompson to interview and obtain affidavits from expert witnesses: Martha H. Page, Ed.D., Dr. Cheryl L. Thompson, Ph.D. and Louis B. Shlesinger, Ph.D.

[Da 5 and 7 ].

On August 07, 2007, defendant filed s letter-brief in support of his petition for Post-Conviction Relief, which states the following issues:

Legal Argument: Trial and Appellate Counsel were Prejudicially Ineffective by Failing to Discover and Raise the Issue of the Defendant's Lack of Competence to Stand Trial.

[Da 9 and 11 ].

PCR counsel is in direct violation of R. 3:22-6(d), State v. Rue, and State v. Webster, by failing to investigate and present any of the remaining issues in the defendant's pro se brief and second amended petition. Counsel did not list the remaining issues nor incorporating them by reference so that the judge may consider them at the February 29, 2003, Post-Conviction Relief hearing. see Webster, supra, 185 N.J. at 257.

The Supreme Court in Rue states:

PCR is a defendant's last chance to raise constitutional

error that may have affected the reliability of his or her criminal conviction. It is not pro forma ritual that is why we require provision of counsel. Under our scheme that attorney is responsible to communicate with his client and investigate the claims. State v. Velez, 329 N.J. Super. 128, 133 (App. Div. 2000) (remanding case to trial court to determine whether trial counsel fulfilled his obligations to interview trial counsel, meet with defendant, submit brief argue on behalf of defendant); State v. King, 117 N.J. Super. 109, 111 (App. Div. 1971). Based on the communication and investigation, counsel then must "fashion the most effective arguments possible." \*

\* \* In some cases, the record will give PCR counsel a wealth of grist for his or her mill, in some cases not. At the very least, where communication and investigation have yielded little or nothing, forward in a petition and brief and make the best available arguments in support of them. Rue, supra, 175 N.J. at 18 and 19.

Here, in this case, the defendant contends that PCR counsel did not meet the letter nor the spirit underlying R. 3:22-6(d), counsel's violation of R. 3:22-6(d), Rue and Webster requires a briefing schedule and hearing even if the defendant's remaining issues have no apparent merit. Rue, supra.

Notwithstanding the fact that the defendant does not need to demonstrate that the remaining issues have merit in order to prevail on this motion for reconsideration, the remaining issues indeed have significant merit.

Therefore, on reconsideration, this case must be remanded as indicated below.



Conclusion

For the foregoing reasons, the defendant respectfully requests that this Court vacate the February 29, 2008 denial of his Petition for Post-Conviction Relief and allowing the defendant to present his remaining claims that were not addressed at this Court. And Ordering the Public Defender's Office to appoint new PCR counsel to "file an application forwarding the claims raised and required by R. 3:22-6(d), [State v. Rue, 175 N.J. 1 (2002) and State v. Webster, 187 N.J. 254 (2006) ] and that the matter should be considered as a first PCR application." see Rue, supra. 175 N.J. at 12-13.

Dated: March 10, 2008

Respectfully submitted,

Marvin Mathis  
Marvin Mathis

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - UNION COUNTY  
Union County Ind. No.  
97-02-123

STATE OF NEW JERSEY,

Plaintiff-Respondent;

v.

MARVIN MATHIS,

Defendant-Movant.

CRIMINAL ACTION

Motion For Reconsideration  
of February 29, 2008 Order  
Denying Defendant's Motion  
For Post-Conviction Relief

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ATTACHED APPENDIX

---

Marvin Mathis #304144/244859-C  
New Jersey State Prison  
P.O. Box 861  
Trenton, New Jersey 08625-0861

April 25, 2005

Andrea Ferraro  
Criminal Division Manager  
Courthouse Annex 7th Floor  
Elizabeth, New Jersey 07207

CRIMINAL  
DIVISION  
APR 26 2005  
ANDREA FERRARO  
Criminal Division Manager

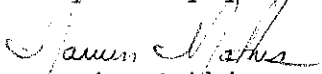
State v. Marvin Mathis  
Union County Ind. No. 97-02-123

Re: Request Notification of filig of defendant's  
memorandum of law and appendix.

Dear Ms. Ferraro:

On February 24, 2005, I timely submitted to your office  
my memorandum of law and appendix in support of petition for  
Post Conviction Relief in the above-captioned matter. I've  
not received notice as to whether the brief and appendix has  
been filed nor a filed copy return back to me.

Thank you for your time and assistance.

Very truly yours,  
  
Marvin Mathis

Marvin Mathis 304144 244859C  
New Jersey State Prison  
P.O. Box 861  
Trenton NJ 08625

Superior Court of New Jersey  
Law Division - Union County  
Ind. No. 97-02-123

State of New Jersey,	:	
Plaintiff-Respondent;	:	Criminal Action
v.	:	On Petition for Postconviction Relief
Marvin Mathis,	:	
Defendant-Petitioner.	:	

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Memorandum of Law and Appendix in Support  
of Petition for Postconviction Relief

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RECEIVED AND FILED  
SUPERIOR COURT  
UNION COUNTY  
Criminal Case-Management Office

Marvin Mathis #304144/244859-C  
New Jersey State Prison  
P.O. Box 861  
Trenton, New Jersey 08625-0861

OCT 01 2006

BERNADETTE A. FIORE, Ph.D.  
Criminal Division Manager

RECEIVED AND FILED  
SUPERIOR COURT  
UNION COUNTY  
Criminal Case-Management Office

SEP 15 2006

BERNADETTE A. FIORE, Ph.D.  
Criminal Division Manager

September 14, 2006  
Bernadetta A. Fiore, Ph.D.  
Criminal Case Manager  
Criminal Case Management Office  
2 Broad Street  
Elizabeth, New Jersey 07207

Re: State v. Marvin Mathis  
Union County Indictment No. 97-02-123

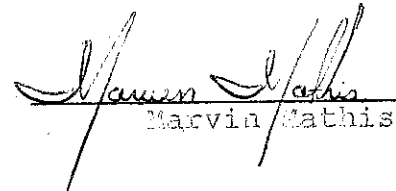
Dear Miss Fiore:

Enclosed for filing please find an original and a copy  
of each of the following documents:

1. Second Supplemental Amended Petition for Post  
Conviction Relief; and
2. Certificate of Service.

Enclosed please return the extra copy of this cover letter  
to me stamped "FILED" in the self-addressed stamped envelope  
provided as proof of filed for my records.

Very Truly Yours,

  
Marvin Mathis

Cc: w/2 copy. ea. encl. Union County Prosecutor.  
w/ 1 copy. ea. encl. Lewis D. Thompson, Esq.

Honorable John F. Malone, J.S.C.

Marvin Mathis #304144/244859-C  
New Jersey State Prison  
P.O. Box 861  
Trenton, New Jersey 08625-0861  
(Movant), Pro Se

Presently Confined

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION-UNION COUNTY

Indictment No. 97-02-123

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STATE OF NEW JERSEY,

Criminal Action

Plaintiff-Respondent  
(Respondent);

Second Supplemental Verified  
Petition For Post-Conviction  
Relief

-VS.-

Marvin Mathis,

Defendant-Petitioner  
(Movant)

---

Petitioner, Marvin Mathis, presently incarcerated at New Jersey State Prison, in the City of Trenton, and State of New Jersey, by way of this Second Supplemental Verified Petition for Post-Conviction Relief, says:

Union County Indictment No. 97-02-123 charged petitioner Marvin Mathis with: Murder, Contrary to N.J.S.A. 2C:11-3a(1) and/or (2) (count one); first degree robbery, Contrary to N.J.S.A. 2C:15-1 (count two); first degree felony murder, Contrary to N.J.S.A. 2C:11-3a (3); possession of a weapon for an unlawful purpose, Contrary to N.J.S.A. 2C:39-4d (count four) and unlawful possession of a weapon Contrary to N.J.S.A. 2C:39-5d (count five)



On June 2, 2000 the Appellate Division affirmed Petitioner conviction. A Petition for Certification was subsequently filed with the State Supreme Court and denied on October 11, 2000.

This Second Amended Petition is intended to supplement and clarify the initial petition for Post-Conviction Relief filed in this matter on or about April 26, 2001 and the same is hereby incorporated as if set forth at length.

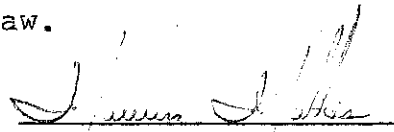
Accordingly petitioner respectfully requests assignment of counsel and a hearing afforded. The accompanying Post-Conviction Relief is being brought so that this Court can address the constitutional questions that will be submitted. Petitioner is ultimately seeking and requesting that the Court correct the errors that were committed during his trial by vacating the judgment of conviction and remanding the case for a new trial. And also correcting the errors that were committed during his Juvenile Waiver Hearing by remanding the case so that Petitioner may have a new Juvenile Waiver Hearing.

Petitioner conviction must be vacated because his right to effective assistance of counsel at trial and on direct appeal served to deny petitioner his rights to a fair trial and due process of law contrary to the Sixth and Fourteenth Amendment, guaranteed by Article I, paragraph 10 of the New Jersey Constitution. (4) To substantiate petitioner's Competency Claim set forth in his Supplemental Verified Petition for Post-Conviction Relief, which was submitted ( Dated February 2, 2006) Petitioner requests that assigned counsel Lewis D. Thompson to interview and obtain affidavits from expert witnesses: Martha

H. Page, Ed.D, Dr. Cheryl L. Thompson, PH.D and Dr. Louis B. Schlesinger, PH.D. (5) Defense counsel Walter Florczak failed to investigate the competence of the defendant's waiver of his constitutional right to testify at the waiver of jurisdiction hearing in Juvenile Court. Such waiver was not Voluntarily, Knowingly, and Intelligently made, Counsel had evidence and was aware of defendant's low intellectual functioning. Defendant was denied the right to effective assistance of counsel in violation of U.S.C.A. Const. Amend. 6 and 14. (6) Appellate counsel failed to raise on direct appeal defendant's constitutional right to testify on his own behalf at the waiver hearing in juvenile Court was not Knowingly and Intelligently waived. Defendant was denied the right to effective assistance of counsel and due process of law in violation of U.S.C.A. Const. Amend. 6 and 14. (7) Appellate counsel failed to raise on direct appeal evidence of defendant's limited mental ability and his status as a special education student was relevant. (See Trial transcript, June 11, 1998, Morning Session 114-19 through 117-12) Defendant was denied the right to effective assistance of counsel and due process of law in violation of U.S.C.A. Const. Amend. 6 and 14.

WHEREFORE, defendant asserts that he was denied due process of law, the right to a fair trial, the right to effective assistance of counsel and the compulsory process for obtaining witnesses in his favor, by both defense and appellate counsel, as guaranteed by both State and Federal Law.

Dated: September 14, 2006

  
Marvin Mathis  
Petitioner-Defendant

RECEIVED AND FILED  
SUPERIOR COURT  
UNION COUNTY  
Criminal Case-Management Office

AUG 10 2007

Marvin Mathis #304144/244859-C  
New Jersey State Prison  
P.O. Box 861  
Trenton, New Jersey 08625-0861  
Defendant-Petitioner

BERNADETTE A. FIORE, PhD.  
Criminal Division Manager

August 07, 2007

Bernadetta A. Fiore, PH.D.  
Criminal Case Manager  
Criminal Case Management Office  
2 Broad Street  
Elizabeth, New Jersey 07207

Re: State v. Marvin Mathis  
Union County Ind. No. 97-02-123

Dear Miss Fiore,

Enclosed for filing please find an original and one copy  
of the following documents:

1. Letter-Brief in support of Post-Conviction Relief  
[Pursuant to N.J. Rule 3:22 et seq.]; and
2. Certificate of Service.

Enclosed please return the extra copy of this cover letter  
to me stamped "**FILED**" in the self-addressed stamped envelope  
provided as proof of filing for my records.

Very truly yours,

*Marvin Mathis*  
Marvin Mathis

Cc: w/2 cpy. encl.: Union County Prosecutor.  
w/1 cpy. encl.: Lewis D. Thompson, Esq.

Marvin Mathis #304144/244859C  
New Jersey State Prison  
P. O. Box 861  
Trenton, New Jersey 08625

Hon. John F. Malone, J.S.C.

PRESENTLY CONFINED

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, UNION COUNTY  
UNION COUNTY IND. NO. 97-02-123

STATE OF NEW JERSEY, :  
Plaintiff-Respondent, :  
v. :  
MARVIN MATHIS, :  
Defendant-Petitioner. :  
:

CRIMINAL ACTION

LETTER-BRIEF IN SUPPORT OF  
POST-CONVICTION RELIEF, PURSUANT  
TO N.J. RULE 3:22 et seq.

HONORABLE JUDGE JOHN F. MALONE, J.S.C.  
Union County Courthouse  
2 Broad Street, 3rd Floor  
Elizabeth, New Jersey 07207

Re: On Petition for Post-conviction Relief  
State v. Marvin Mathis  
Union County Ind. No. 97-02-123

Dear Honorable Judge Malone:

Pursuant to N.J. Rule 2:6-2(b), please accept this letter-  
brief and appendix in lieu of a more formal brief in support  
of defendant's petition for post-conviction relief.

Da 10

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FAILING TO DISCOVER AND RAISE THE ISSUE OF THE DEFENDANT'S  
LACK OF COMPETENCE TO STAND TRIAL. N.J. CONST. (1947) Art. 1,  
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Sixteen-Page report of Louis B. Schlesinger, PH.D. ....  
¶ Petitioner will rely on his pro se appendix in his Memorandum  
pages 1 through 31, submitted February 24, 2005.

TRANSCRIPT CITATIONS

"1MT" refers to the transcript of the juvenile waiver hearing  
on October 10, 1996.  
"2MT" refers to the transcript of the juvenile waiver hearing  
on November 11, 1996.  
"3MT" refers to the transcript of the Miranda hearing on  
June 9, 1998.  
1T refers to the trial transcript of June 10, 1998.  
2T refers to the trial transcript of June 11, 1998. (a.m.).  
3T refers to the trial transcript of June 11, 1998 (p.m.).  
4T refers to the trial transcript of June 16, 1998.  
5T refers to the trial transcript of June 17, 1998 (a.m.).  
6T refers to the trial transcript of June 17, 1998 (p.m.).  
7T refers to the trial transcript of June 18, 1998.  
ST refers to the sentencing transcript of August 14, 1998.